No. 85-1968.

Supreme Court, U.S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1985.

THE CAMBRIDGE WIRE CLOTH COMPANY,
PETITIONER,

v.

THE LAITRAM CORPORATION AND
INTRALOX, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Brief of Respondents in Opposition to Petition for Writ of Certiorari.

PAUL J. HAYES,
Counsel of Record,
VICTOR B. LEBOVICI,
WEINGARTEN, SCHURGIN, GAGNEBIN & HAYES,
One State Street,
Boston, Massachusetts 02109.
(617) 523-8030
Attorneys for Respondents The Laitram Corporation and Intralox, Inc.

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Question Presented for Review.

The question presented is whether the Supreme Court should grant certiorari to review *de novo* the factual findings of the District Court, where the Petition for a Writ of Certiorari ignores all of the specific findings of the District Court and all of the record evidence favorable to the respondent and where the outcome will have no effect on either the injunctive relief or damages in the case.

Listing of Parties.

The parties in this action are the parties identified in the caption hereto. Intralox, Inc., is a wholly owned subsidiary of the Laitram Corporation. These parties constitute the listing of parties required under Rule 28.1.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

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Statement of the Case.

Contrary to the assertions of Petitioner (Cambridge Wire Cloth Company, hereinafter "CWC"), the facts for the purposes of this Petition, are not those urged again by CWC, but rather, those facts found by the District Court which were affirmed

by the Court of Appeals for the Federal Circuit. Respondent sets forth the pertinent facts below to correct numerous inaccuracies in the Petition for a Writ of Certiorari.

A patent infringement action was brought by the Laitram Corporation against CWC in the United States District for the District of Maryland (Appendix C, at 9a).[1] At the commencement of trial, Intralox, Inc., a subsidiary of the Laitram Corporation, was added as co-plaintiff (The Laitram Corporation and Intralox, Inc. are hereinafter referred to jointly as "Laitram"). During the course of a nine day trial, the District Court took evidence in the form of testimony, expert and otherwise, amounting to a transcript over 1400 pages in length, and the District Court considered approximately 300 exhibits, including physical exhibits, charts, diagrams, patents and correspondence as well as miscellaneous demonstrative evidence (Appendix C, at 10a).

At trial, CWC contended, *inter alia*, that claim 19 of U.S. Patent 3,870,141 (the "'141 patent") was invalid as anticipated by the German patent 113,669 issued to Malard (the "Malard patent"). Substantial testimony and evidence was received with respect to this issue at trial.

At trial, CWC's counsel elicited testimony from Mr. Lapeyre, Sr., with respect to an "assumed" structure not disclosed in the Malard patent. In response to questioning by CWC's counsel, Mr. Lapeyre stated that there was a correspondence between a structure which he was asked to "assume" and the claims of the '141 patent (Appendix G, at 8b, 18b). The questioning wholly ignored the significant differences be-

[1] Appendices A-F are appended to petitioner's brief. Appendix G is appended hereto and includes selected pages of the Joint Appendix filed in the Court of Appeals for the Federal Circuit. Reference to Appendices are by page. Petitioner's appendix includes pages 1a-59a. Page numbers in respondents' appendix are designated 1b-36b to distinguish from references in the appendix in petitioner's brief.

tween the structure disclosed in the Malard patent and the structure which was the subject of claim 19 of the '141 patent asserted by Laitram. The court, during trial and in closing argument, recognized that Mr. Lapeyre's testimony, upon which CWC now relies, was with respect to a structure "conjured up" by CWC's counsel (Appendix G, at 20b, 26b, 36b) and was based upon assumptions of CWC's counsel (Appendix G, at 18b, 20b, 26b).

Moreover, Mr. Lapeyre's initial testimony with respect to the imaginary structure assumed by CWC's counsel, occurred before Mr. Lapeyre, Sr. had an opportunity to study the Malard patent and before he had even read the Malard patent (Appendix G, at 7b). Thereafter, Mr. Layepre did read and study the Malard patent (Appendix G, at 9b) and he identified significant differences between the structure recited in claim 19 of the '141 patent and the structure disclosed in the Malard patent (Appendix G, at 10b-13b). The legal definition of anticipation was explained to Mr. Lapeyre (Appendix G, at 15b-16b) and Mr. Lapeyre testified as follows.

> Q. Now, Mr. Lapeyre, under that definition, does the Malard patent show all of the same elements found in the same situation united in the same way to produce the same or identical functions in the one Malard patent, is that, are they all found, all of your, all the elements of your invention found?
>
> A. Absolutely not. (Appendix G, at 16b).

Additionally, CWC's own witnesses identified differences between the structure recited in claim 19 of the '141 patent and that disclosed in the Malard patent and Mr. Schiller, the attorney who prosecuted the '141 patent also testified with respect to the differences between the prior art Malard patent and the subject matter of claim 19.

Following the nine day trial and having had the benefit of the live testimony of expert and fact witnesses (Appendix C, at 4a), and after reviewing the scope and content of the prior art Malard patent (Appendix C, at 25a), the District Court found that claims 1, 2, 10, 11, 15, 19, 20 and 21 were valid and that such claims were infringed by products manufactured and marketed by CWC (Appendix D, at 51a). With respect to CWC's present contention, the District Court made a specific finding that:

> "There is the Malard patent, which is a German patent. Those two are also prior art in this general realm. I do not find that the defendant has shown by clear and convincing evidence that this prior art, alone or in combination, itself suggests to one ordinarily skilled in the art the combination of elements that eventually resulted in '141 patent." (Appendix C, at 24a).

The District Court additionally made specific findings that the Malard patent taught the use of "dissimilar links" and not "like" modules as recited in claim 19 of the '141 patent (Appendix B, at 24a-25a). The District Court also found that the Malard patent did not teach the use of modules linked together in an interlaced, bricklayed fashion as claimed in claim 19 of the '141 patent (Appendix B, at 24a).

CWC appealed from the decision of the Maryland District Court holding the '141 patent valid and infringed. The Court of Appeals for the Federal Circuit, after consideration of the briefs and a seven volume appendix, affirmed the decision of the court and specifically stated:

"Similarly, the Malard reference neither anticipates nor renders obvious any of Laitram's patents." (Appendix A, at 4a).

CWC filed a Petition for Rehearing in banc which was denied. Thereafter CWC filed the present Petition for a Writ of Certiorari seeking review of the factual finding of the Court.

Reasons Why the Petition Should Be Denied.

A. No Issues of Legal Significance Are Presented in the Present Petition.

CWC does not contend that this Petition involves an important question of Federal law. Likewise, CWC does not contend that the decision of the Court of Appeals for the Federal Circuit is in conflict with applicable decision of this circuit. Moreover, CWC's Petition is of no legal consequence to the case.

The District Court held that claims 1, 2, 10, 11, 15, 19, 20 and 21 of the '141 patent were valid and found infringement of all asserted claims (Appendix D, at 51a). The District Court's decision was affirmed by the Court of Appeals. CWC here seeks review only with respect to claim 19. The decision of the District Court is therefore final with respect to the remaining claims 1, 2, 10, 11, 15, 20 and 21. Thus, CWC remains liable for infringement of claims 1, 2, 10, 11, 15, 20 and 21 and CWC will not be relieved from the judgment which included injunctive relief and the payment of monetary damages. CWC's Petition is therefore of no practial or legal significance and operates only to further delay the enforcement of the judgment in this case.

Finally, as discussed below, there has been no departure from the usual and accepted course of judicial proceedings which would warrant the exercise of this Court's supervisory powers.

Because CWC's Petition fails to raise any significant legal questions, it should be denied.

B. The District Court's Findings Are Not Clearly Erroneous.

Though ignored in CWC's petition, there are evidentiary burdens upon a party that challenges a trial court's decision. The law is clear that the findings of a trial court shall not be set aside unless "clearly erroneous" and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855-856 (1982); *Paper Converting Machine Co.* v. *Magna-Graphics Corp.*, 745 F.2d 11, 21-22 (Fed. Cir. 1984). The courts have stated that the District Court's factual determinations must be accepted unless the challenging party can show that the findings are *not clearly supported by substantial evidence*, thus leaving the court with a "definite and firm conviction that a mistake has been committed". *Raytheon Co.* v. *Roper Corp.*, 724 F.2d 951, 956 (Fed. Cir. 1983) (quoting *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982)); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983). CWC must demonstrate clear error in the District Court's factual findings based only upon the trial record. *Schenck, A. G.* v. *Norton Corp.*, 713 F.2d 782, 785 (Fed. Cir. 1983). It is not the role of the Appellate Court, let alone the Supreme Court, to review the fact record *de novo*, nor does it sit to re-hash the evidence or decide who

among the opposing witnesses are to be believed. *Raytheon Co.* v. *Roper Corp.*, 724 F.2d at 956; *Rosemount, Inc.* v. *Beckman Instruments, Inc.*, 727 F.2d 1540, 1547 (Fed. Cir. 1984). CWC must demonstrate that the factual conclusions of the District Court are not supported by substantial evidence. *Studiengesellschaft Kohle M.B.H.* v. *Dart Industries, Inc.*, 726 F.2d 724, 727 (Fed. Cir. 1984). Arguments by CWC that the trial court could have adopted other factual conclusions are irrelevant. CWC must show that the *actual* conclusions reached were "clearly erroneous." *Studiengesellschaft Kohle M.B.H.* v. *Dart Industries, Inc.*, 726 F.2d at 727.

The District Court rejected the contention that the Malard patent anticipated claim 19 of the '141 patent (Appendix C, at 24a) and held claim 19 valid and infringed (Appendix C, at 33a). The District Court elaborated and made specific factual findings with respect to the differences between the prior art Malard patent and the subject matter of claim 19 (Appendix C, at 24a-25a). CWC in its Petition wholly ignores the factual findings of the court, and all of the trial testimony adverse to its present contention, and mischaracterizes bits and pieces of the record taken out of context in an effort to have this Court reassess the weight that should be given to the testimony of the respective witnesses. In essence, CWC's Petition is based upon the untenable premise that only evidence favorable to its position should be considered and all adverse evidence should be ignored. It is telling that CWC does not, in its Petition, even address all of the testimony and trial exhibits adverse to its contention. CWC's present arguments have already been reviewed by the Court of Appeals and have been rejected (Appendix A, at 4a). The Federal Circuit expressly stated:

> "Similarly, the Malard reference neither anticipates nor renders obvious any of Laitram Patents." (Appendix A, at 4a).

As will be well apparent, the factual findings are amply supported by the record. Contrary to CWC's self-serving remarks, no reason exists for the exercise of this Court's jurisdiction in the present case. There has been no departure from the accepted and usual course of judicial proceedings in the present case.

Anticipation under 35 U.S.C. § 102 requires the presence in a single prior art reference of each and every element of the claimed invention arranged as in the claim. *Connell* v. *Sears, Roebuck and Co.*, 722 F.2d at 1548. Anticipation is a factual determination which is reviewable only under the "clearly erroneous" standard. *Atlas Powder Co.* v. *E.I. du Pont De Nemours and Co.*, 750 F.2d 1569, 1573 (Fed. Cir. 1984). The sole question properly before this Court is whether there is *substantial evidence* of record which supports the affirmance by the Court of Appeals, of the District Court's finding that the Malard reference does not anticipate claim 19 of the '141 patent.

CWC contends that the Court of Appeals for the Federal Circuit committed reversible error in upholding the finding of the District Court that German Patent No. 113,669-Malard does not anticipate claim 19 of the Malard patent.

The first paragraph and the last paragraph of claim 19 of the '141 patent are the subject of the instant controversy. CWC erroneously contends that the disclosure of the Malard patent meets the language of these paragraphs. The language of paragraph 1 calls for "like modules" and the court heard testimony at trial that paragraph 4 of claim 19 corresponds to a bricklaying structure (Appendix G, 1b-3b). At the conclusion of trial the District Court made findings that:

> 1. None of those patents, showed a maximization of the shear forces on the pivot rod holding the whole structure together with (either alone or in combina-

tion with other patents) a teaching of bricklaying belt construction with like modules;

2. Malard does not show like modules but rather a randomly assembled group of dissembler links;

3. With Malard you do not get the idea of like modules linked together in an interlaced bricklayed fashion. (Appendix C, at 24a-25a).

The District Court's findings were affirmed by the Court of Appeals for the Federal Circuit and are amply supported by the evidence.

The court heard substantial testimony from the witnesses with respect to the claimed structure and the structure of the alleged "anticipatory reference". Mr. Lapeyre testified that the disclosed Malard structure did not meet the language of paragraph 1 of the claim, specifically identifying the failings of the Malard reference (Appendix G, at 10b-13b, 17b). Mr. Lapeyre further testified that the Malard modules were unlike, since the Malard modules, along the edges of the belt, have portions of the link ends machined out to accommodate a locking device or nut (Appendix G, at 12b-13b). Mr. Schiller, the attorney who prosecuted the '141 patent, testified that the Malard patent teaches the use of *six* different types of modules (Appendix G, at 31b-32b, 33b) unlike the claimed invention which employs "a plurality of like modules". The court in closing arguments recognized, and CWC's counsel acknowledged, that the Malard patent taught the use of a number of "different" modules (Appendix G, at 35b). Based upon this evidence the court fully appreciated that the Malard structure, in contrast with the claimed structure, taught the use of dissimilar links (Appendix C, at 24a) and correctly found that Malard does not make obvious, let alone anticipate, the subject matter of claim 19 of the '141 patent (Appendix C, at 25a).

The court also heard considerable testimony from the witnesses with respect to the meaning of paragraph 4 of the claim and the failings of the Malard reference to meet the language. Mr. Lapeyre testified that the structure recited in paragraph 4 of the claim corresponded to a bricklaid structure. Mr. Lapeyre explained that Malard did not show bricklaying (Appendix G, at 11b-12b, 17b) because Malard exhibited seams along adjacent modules in the direction of belt travel in contrast to the claimed invention (Appendix G, at 14b). Mr. Schiller testified that Malard does not show bricklaying (Appendix G, at 31b, 34b). Mr. Andrews, CWC's expert, admitted that the Malard modules were not bricklayed into the rest of the belt (Appendix G, at 27b) and that while Malard exhibited seams in the direction of belt travel (Appendix G, at 28b, 30b) no such seams were present in a belt made in accordance with teachings of the '141 patent (Appendix G, at 29b). All of the aforementioned testimony is ignored in CWC's Petition. Accordingly, the Court's finding that claim 19 is not anticipated by the Malard patent is amply supported by the evidence and is not clearly erroneous.

Contrary to the assertions of CWC in its brief, Mr. Lapeyre never admitted that claim 19 of the '141 patent was anticipated by the structure disclosed in the Malard patent. The record clearly shows that Mr. Lapeyre's testimony, now relied upon by CWC, was not with respect to an "embodiment" of Malard as suggested to this Court in CWC's brief, but rather with respect to a hypothetical structure (Appendix G, at 8b, 20b) "conjured up" by CWC's counsel (Appendix G, at 36b). As apparent from the record, this was fully appreciated by the District Court (Appendix G, at 20b, 36b). As stated by the court to CWC's counsel:

> "THE COURT: Well, sure you can conjure up a situation where they're all alike."

The law is settled that anticipation cannot be based upon conjecture. *W. L. Gore & Associates, Inc.* v. *Garlock, Inc.*, 721 F.2d 1540, 1554 (Fed. Cir. 1983) *cert. denied*, 105 S.Ct. 172 (1984). Mr. Lapeyre's testimony relating to the hypothetical structure "conjured up" by CWC's counsel and not disclosed in the Malard patent is therefore irrelevant. *Id.*

On appeal, CWC ignores all of the testimony and evidence supporting the District Court's findings, the decision of the Court of Appeals for the Federal Circuit affirming the findings of the District Court, and the decision of the full bench of the Court of Appeals for the Federal Circuit denying CWC's Petition for rehearing in banc and would have this Court retry this issue *de novo*.

The District Court clearly articulated the proper legal standard for determining anticipation, considered the scope and content of the Malard patent and found claim 19 not invalid as anticipated in view of Malard (Appendix C, at 24a-25a). The District Court's finding that the Malard patent does *not* anticipate claim 19 which has been affirmed by the Court of Appeals is amply supported by the evidence and is therefore not clearly erroneous. In view of the ample record support for the affirmance of the District Court's findings, CWC's Petition should be denied.

Conclusion.

Laitram respectfully submits that CWC has wholly failed to sustain its burden under Rule 19 of showing special and important reasons why the Writ should be granted. The decision below did not involve an important question of Federal law nor has the Court of Appeals rendered a decision in conflict with the applicable decisions of this Court. The District Court

and the Appellate Court have not departed from the usual and customary course of judicial proceedings in the present case. The Court of Appeals for the Federal Circuit correctly held that the District Court's findings were not clearly erroneous.

CWC's Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

PAUL J. HAYES,
VICTOR B. LEBOVICI,
WEINGARTEN, SCHURGIN,
GAGNEBIN & HAYES,
One State Street,
Boston, Massachusetts 02109.
(617) 523-8030
Attorneys for Respondents
The Laitram Corporation and
Intralox, Inc.

Appendix.

NOTE: Appendicies A-F are appended to petitioner's brief and include page designations 1a-59a. Appendix G is appended hereto and includes selected pages from the Joint Appendix filed with Court of Appeals for the Federal Circuit. Page designations 1b-36b refer to pages within Appendix G of respondent's brief.

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Appendix G.

country and abroad.

Q. 3,500 different plants?

A. Different plants.

Q. Give me an example of such types of plants, I mean some name. Just a couple?

A. Well, that's not my department, but I remember a few, Frito- Lay, DelMonte I mentioned, I think we have some in Campbell's soup, we have some in Nabisco, we have some in one of the big rubber companies, I can never remember whether it's Goodyear or Goodrich. We have some in National Can, more and more and more of those types of companies. Mr. Meyer will be able to give you a thorough list, I'm sure.

Q. Sir, I show you, what has been marked as PX 32.

MR. JOYCE: Your Honor, may I move into a position so I can see all the boards? Your Honor, is all right if I move?

THE COURT: Oh, of course, Mr. Joyce.

MR. LEPAYRE: Do you want me to stand up?

MR. HAYES: I don't care Dan.

DIRECT CONTINUES

Q. Mr. Lepayre this is the big four of the 141 patent?

A. Yes.

Q. And you colored it in in different colors. Could you explain to the Court why did you color it in, to show what?

A. We colored it in because the definition of a module without

the color, is not to easy from fig. 4, when it's all in white and black. And we wanted to show that this green portion, for instance, represents roughly a whole module. I say roughly because there are some parts missing. This pink portion represents a portion of the same module. The blue portion represents an other module and so on. And the joint between where the pink and the green join is intermediate. The whole module shown in blue here, and it would also be intermediate the following module back here. We call these adjacent modules to the one where we have this joint. The purpose of this coloring being finally to clarify that the joints between modules of rows fall intermediate the joints of modules of adjoining rows.

Q. And is that what is called in the parlance, you call it, bricklaying?

A. Yes, we call it bricklaying because it resembles what is know in architecture as a staggered line on a building where the vertical joints lie between the whole bricks.

Q. Sir, in your patent you speak of a module, particularly in the claims, and throughout the patent. Would explain to the Judge, if you may, what is meant by a module and what affect does the module have with respect to the construction of the belt, and particularly the width?

A. I'll try. Well, Your Honor, a module to our way of thinking,

is that it's one unit which we can injection mold and from that unit we can manufacture belts in any width and any length. It requires subdividing of the module, but the subdivisions of the module are identical in all respects, except for the number of parts that they have.

Q. And when you build a belt in accordance with your invention, having the structure that allows for this, what does that module concept give you with respect to say strength, etc.

A. Well, the module when it is bricklayed in the fashion that we outlined in figure 4 gives you an extremely strong belt because the cross members that you can see running this way joining the links overlapped by the cross members of suceeding and preceeding cross members. This transfers the load, the lateral load, along the width of the belt from link to link to cross member to cross member and therefore the belt in a lateral direction will be self-supporting. The rods only, the job they have to do really, is hold the belt together in a tension mode.

Q. Now sir, in a belt for example say a metal belt with the say you made a four foot wide metal belt, and had the — out of wire links and had the width of the belt all one piece, with me?

A. Yes.

Q. Is that a module?

A. I don't consider that a module.

Q. And why is that not a module?

A. Well, because a different length piece has to be made or manufactured custom wise for every width belt that is made.

Q. And the table top belt, I think it's PX 13, is that a module?

A. No. That's not a module in the sense that it's not side to side joinable. As a matter of fact, other companies have arranged those belts in a side to side mode, driven separately, and one of the major problems they have is keeping the edges, where the edges of the belt meet, is keeping those edges in a co-plain.

Q. And is a module under your definition bricklayered? Can you bricklay a belt such as the table top?

A. No.

THE COURT: These modules are molded in one standard size I gather.

MR. LEPAYRE: Yes sir, we have a molding machine, which in some cases will mold four identical modules at one time in the same machine. And in some machines we can mold more than four, but that's the standard number for identical modules.

THE COURT: And if someone would want a very narrow belt reason?

MR. LEPAYRE: Cut the cross members.

THE COURT: What's the life of your standard molded

. . . . . .

down in relation to this row and this row could slide in relation to this row until pretty soon you'd have an uncontrollable mess on your hands.

Q. And how does defendant's belt solve that problem? In what function and operation?

A. Defendant's solves that problem by inserting little stops on some of the link ends so that there would be intermediate link ends of adjacent modules and thereby act as stops for the whole module.

Q. And the result of that operation —

A. The result of that is to give a nice neat straight belt.

Q. Now can you go to paragraph 3.

A. Paragraph 3. Means of pivotally connecting said modules unengaged link ends — I don't even think I have to go further on that.

Q. Okay. Go to paragraph 4.

A. Said modules being arranged in staggered relation with said edge of each module being disposed intermediate side edges on an adjacent pivotal connected module so that the relative motion of each and adjacent modules parallel to a line through the engaged link ends thereof is prevented by engagement of said link ends.

Q. What does that all mean?

A. Well it means that this module being a whole module has adjacent to it a joint of two modules which are intermediate

to the link ends of the module.

Q. What is that called?

A. That is called bricklaying.

Q. Now sir does the belt, the defendant's belt, perform substantially the same function in substantially the same manner? Substantially the same result as your invention as described in claim 19?

A. Yes, it does.

Q. Could you look now at the dependent claim, claim 20. To depends off claim 19.

A. A belt is defined in claim 19 wherein said modules are arranged so that a side of each module is disposed substantially centrally between the sides of adjacent modules.

Q. How's that compared to defendant's belt?

A. It's I would say they dispose substantially central.

MR. HAYES: Your Honor, this would be a good time for a break if you want.

THE COURT: What did you say, you are going to go into the other patents?

MR. HAYES: Where our contention has obviously been infringement in claim 1 and claim 19 of this but only claim 19 with respect to the White Belt. This is another one they made.

THE COURT: All right.

MR. HAYES: And what — we'll do it front and back

. . . . . .

Q. Did Mr. Schiller understand at the time that you were handling this case with him that this patent application was directed to the concept of modular construction to make belts of any size length and any size width?

MR. HAYES: Objection.

THE COURT: Overruled.

BY MR. JOYCE:

A. I don't know what he thought, but the patent should speak for what Mr. Schiller understood, it seems to me.

Q. And you've been reviewing this patent and interpreting in this case, and that deals with the brick laying concept whereby belts of different lengths and widths can be achieved, right?

A. Right.

Q. Now, sir, have you had a chance to review the Malard Patent?

A. Only the drawings. And only the drawings cursorily.

Q. Well, would you look at them for just a few more minutes, and I'll ask you — have you looked sufficiently to answer questions about it?

A. I'll know whether I've looked sufficiently when I hear the questions. so you can go ahead, Mr. Joyce.

Q. Does the Malard Patent relate to a linked conveyor belt?

A. It says it forms a link fabric made completely of metal or other hard materials to transport and other purposes,

. . . . . .

A."The number of these projections B can be chosen as desired and relates to the width and arrangement of the individual members."

Q. Okay. The projection B are these link ends that you referred to in Figure One, correct?

A. It appears so.

Q. Now, will you agree with me that sentence you just read means that the module can be of a different length and have a different number of projection B than that illustrated?

A. Wait, let me read it again. Chosen as desired. That's right.

Q. In other words, it could have say for purposes of argument, 100 okay?

A. Right.

Q. Now, if it had 100 of these link ends on each side, could that module be cut into a smaller section that would have plurality of link ends on both sides of that sub-module if we want to call it that?

A. Yes.

Q. And in accordance with your definition of like modules, would that be a like module?

A. Yes.

Q. Now, Mr. Lapeyre, I'd like to refer you to Claim 19 of the 141 Patent.

A. Um hum.

. . . . . .

position, as far as I can see.

Q. Does he teach — would it be fair to say that he teaches the opposite to what you teach?

A. He does.

Q. Okay. And under the definition that I gave you of obviousness does Cremona render your patent — do you think your invention is obvious in view of Cremona?

A. No.

Q. Thank you. (pause) All right, Mr. Lapeyre, (pause) I show you defendant's exhibit 28, which is a patent to Malard.

MR. HAYES: Let's get claim 19 of the 141 patent.

BY MR. HAYES:

Q. Now, Mr. Lapeyre, I think you said yesterday was the first time you ever saw Malard, is that correct?

A. That's correct.

Q. Did you have an opportunity last night to go over the drawings in Malard to figure out what it is?

A. Yes.

Q. Did you color — did you do those colorings?

A. I did the colorings myself.

Q. Okay. Now, claim 19 call — it is a belt claim, correct?

A. Yes, sir.

Q. Comprised of modules. Correct?

A. Yes, sir.

Q. It calls for a polarity of white modules, each of said

modules including a first polarity of link ends of length width, and a second polarity of link ends of said length width, right?

A. That's correct.

Q. Sir, I show you the modules, you colored modules in blue, in Malard, correct?

A. That's correct.

Q. Do these modules have a polarity of link ends of like width, a first polarity of link ends of like width?

THE COURT: Plurality, not purality.

MR. HAYES: I have a difficult time with that, as Your Honor (indiscernible)

THE COURT: Plurality.

MR. HAYES: Whatever it is.

BY MR. HAYES:

Q. A first plurality —

THE COURT: North or south you can't pronounce it.

(laughter)

BY MR. HAYES:

Q. Does this module have a first polarity of link ends of like width?

A. It is a first plurality, yes.

Q. And does it have a second polarity?

A. No.

Q. How many — is this belt comprise of a polarity of like

modules each having a first polarity of like links, of link ends of like width, and a second polarity of link ends of like width?

A. No.

Q. How many modules in the belt as shown in Malard do not conform with paragraph 1 of your claim?

A. Well, all of the blue ones. I haven't counted them. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Q. Okay. Now, Mr. Lapeyre, let's get down to the bricklaying portion, on the last paragraph. It says,

> "Said modules arranged and staggered in relation with a side edge of each module being disposed intermediate the side edges of an adjacent pivotally connected module."

A. Right.

Q. And that is under your definition of what classic bricklaying is, correct?

A. I don't know what classic means, but I call it bricklaying because the joints of one fall intermediate with joints of others like you find in a laying up of bricks.

Q. Okay. Now, I direct your attention to two modules in Malard.

A. Yes.

Q. Why don't you label them one and two. Got a pen? (pause) See these two modules, Mr. Lapeyre?

A. Oh, I thought you meant —

Q. Number 1 and 2, right there.

A. I thought you meant the place.

Q. (pause) Thank you. Now, sir, does this belt — that each of the modules in this belt arranged in staggered relation with the side edge of each module being disposed intermediate the side edge of an adjacent pivotally connected module?

A. No.

Q. Does this module, number 2, conform with paragraph 4 of claim 19?

A. No.

Q. Does module 1 conform with paragraph 4 of claim 19?

A. No. (pause) There is still another module in there that doesn't bricklay, that's this one here. It doesn't form intermediate — this (indiscernible). (pause) By the way, Your Honor, may I say something?

THE COURT: Go ahead.

BY THE COURT:

A. They have some other things that are unlike about those modules. Some of these modules have to be machined out, selected one that go on the ends, in order to respond —

Q. For the sprocket drive?

A. No, in order to receive locking devices to keep the rods in place.

Q. I see.

A. So, the rods, so the modules are not —

Q. Does it show that locking device with a separate — call it out out of the figure? I don't see it.

A. It shows it in another figure, and this is —

Q. I see it on there, but it looks like a nut.

A. A nut, but you see, in order to get that in, they have to machine out of this module to fit it in. You don't see that —

Q. Does he describe that in the patent?

A. I didn't read the patent for that description, specifically, but I noticed it in the drawings.

Q. All right. Thank you.

BY MR. HAYES:

Q. Now, Mr. Lapeyre, during the prosecution of your patent, 141, the Stanius reference was cited by the examiner. Is that correct?

A. That's correct.

Q. Let me show you Stanius, which is marked as, I believe — DX 7C. (pause)

(conference)

THE COURT: How is this within the scope of the cross-examination?

MR. HAYES: Pardon me, Your Honor?

THE COURT: How is this within the scope of the cross-examination?

MR. HAYES: This is directly going to be related to this. It will take me two minutes just to point it out.

. . . . . .

Q. Maybe I can — I just want to elaborate a little bit. Mr. Lapeyre, you see how links 1 and 2, you say, are not bricklayed in accordance with your invention.

A. Right. That affects the, that would affect the strength. When you don't have the bricklaying that affects the strength; and it affects the lateral strength. For instance, if that pin right at that point, that you, where we have line 1 drawn, were to break, then the belt could dis —

BY THE COURT:

Q. Well, it is even more apparent where you have line 2 drawn through, because there —

A. You happen to line up with another one across the row.

Q. Yes. You have —

A. There is less shear points.

Q. Right. All right. All right. Thank you.

A. Thank you, sir.

BY MR. HAYES:

Q. Now, Mr. Lapeyre, Mr. Joyce asked you a question yesterday about anticipation.

A. Yes, sir.

Q. Do you know what the word anticipation means?

A. Only in the layman's sense.

Q. Do you know what it means with respect to patent lingo?

A. No.

Q. All right. I'm going to tell you what anticipation, the

definition. Anticipation is where you have —

THE COURT: Where are you getting this from?

MR. HAYES: Say again?

THE COURT: Where are you getting this from? I think Mr. Joyce is entitled to know.

MR. HAYES: Sure.

(conference)

MR. HAYES: PX 126, Your Honor.

THE COURT: Your brief?

MR. HAYES: Yes, PX 126. The reason it is marked as a PX —

THE COURT: What case are you —

MR. HAYES: It's Schroeder* v. Owens Corning Fiberglass.

THE COURT: Do you know that case, Mr. Joyce?

MR. JOYCE: No, I don't, Your Honor.

THE COURT: Do you have a copy of it so that Mr. Joyce can see it?

MR. HAYES: No, I don't, Your Honor, but I have — their expert, Mr. Dan, their expert in patent law, has agreed to substantively the same thing, so I think it is —

(conference)

THE COURT: Well, here is the definition that he uses. It says,

> "If all of the same elements are found in exactly the same situation and united in the same way to perform

(* Phonetic)

the identical function in a single priorart reference.

Would you agree? Is that accurate?

MR. JOYCE: That's reasonably (indiscernible) I'm sure the thought has been expressed differently. It may put a shading on it, but --

THE COURT: All right.

BY MR. HAYES:

Q. Now, Mr. Lapeyre, under that definition, does the Malard patent show all of the same elements found in the same situation united in the same way to produce the same or identical function in the one Malard patent, is that, are they all found, all of your, all the elements of your invention found?

A. Absolutely not.

Q. Thank you. And, Mr. Lapeyre, getting back to the obviousness definition — which says, let me read it to you,

> "The critical inquiry is whether there is something in the priorat as a whole —"

The whole thing, not dissected it into pieces, forgetting about some and using some —

> "— to suggest, to teach and thus the obviousness of making the combination."

Did you understand that?

A. I think so.

Q. Okay. Under that definition, sir, does Malard render your patent obvious?

. . . . . .

MR. JOYCE: Did you have that before you, Your Honor, when the discussion of Stanius was —

THE COURT: I did.

BY MR. JOYCE:

Q. Now, sir, are the elements in Stanius patent modules, in the sense that you have defined the term modules throughout this proceeding?

A. Yes, I think they are modules to some extent. He uses, however, not the same module. He uses two different kinds of modules. We call for using the same module, the same module, the same module. These are not the same modules.

Q. The modules as shown in Stanius are the (indiscernible) modules?

A. I don't know. I have to rethink this one. (pause) I would say they are bricklaying, but not bricklaying in the sense that we call for bricklaying, because our modules are sub-dividable anyplace; and his modules are not sub-dividable at all.

Q. And the modules in Malard indeed are bricklaying modules of the type that you have defined as a module?

A. What is that again?

Q. And you have testified, have you not, that the modules shown in figure 1 of Malard are modules that permit bricklaying in the manner that you have defined the term module.

A. No. I didn't say that.

Q. Well, let's start over again. The modules of — your

definition of modules, if I recall, was, is an element which can be joined in a bricklaying fashion so as to produce a belt of any length and any desire width, is that correct, sir?

A. No. It is a module that has a plurality — a module that has a plurality on one end and a like plurality on the other end; and the modules are alike. That is what it says.

Q. Well, sir, I think the record will show repeatedly you have used the term in the sense that the modules can be bricklayed in order to —

A. Well, maybe it will show that, but maybe I made a mistake. Maybe I was in error.

Q. Well, what is it, sir? Has your testimony all through this proceeding been in error in connection with what a module is?

A. No, it has not, but when you take this guy, 100 years old, but, 85, 86 year old patent and then say do this to it and do this to it and do this to it and do this to it, well, then, I, being a neophyte at the, at your game, I got sort of tricked into saying yes to some questions that now that I am getting a little more educated I wouldn't have said yes to. That is what I am saying.

(pause)

Q. Let's take the sample of the — the one we looked at before, the Cam Clean Belt — now, sir, I want to refer you to the recitation of claim 19, right behind you,

"Said link ends of each said modules being releasably

. . . . . .

or in the text of Malard where there is any call for intermediate disposition of adjacent modules?

MR. JOYCE: The text calls for the projections being more than three on one side and two on the other. And when you subdivide that and put it in brick layer form, if you drew the same —

THE COURT: But you're manipulating for anticipation. Isn't the requirement, and maybe I'm reading it wrong here, but it says:

> "All of the same elements are found in exactly the same situation and united in the same way to perform the identical function."

MR. JOYCE: That's correct. And if one were to follow this teaching of the final sentence and have more than the five link ends that are shown in the module of figure one, if one were to take a module with more than five and put it in the relationship that's shown in figure 9, then you would have exactly that.

THE COURT: I want to show you something, Mr. Joyce, and you're an engineer I assume. Most patent lawyers are.

THE CLERK: (indiscernible).

THE COURT: Yes, put it up there. Is that the one that you had up here the other day?

MR. HAYES: Another one, Your Honor.

THE COURT: Let me see the other one. Let me see

134, Plaintiff's 134. Put it up there. Now, let me ask you a question, Mr. Joyce. Do you see where that line 2 is drawn? Do you see that line 2?

MR. JOYCE: Yes, sir.

THE COURT: All right. Track that line through that assembly, will you, as shown there?

MR. JOYCE: I see it, sir.

THE COURT: Now, if you put a load directly over point B there — do you see the B along the line? Do you see that B along line 2?

MR. JOYCE: Yes, sir.

THE COURT: If you put a load right there, along how many link ends, just based on what you see in that picture, would that load be distributed across the pivot rod? Tell me that.

MR. JOYCE: How many link ends would that be distributed across the pivot rod?

THE COURT: Yes, sir.

MR. JOYCE: Well, sir —

THE COURT: Put the load directly over B.

MR. JOYCE: All right. Directly over B.

THE COURT: Now, over how many link ends that you see there would that load be distributed over pivot rods?

MR. JOYCE: I'm not sure I understand your question. These were testified to as being tightly spaced so as to

be (indiscernible) by Mr. Lapeyre. You're talking about gravity load?

THE COURT: Yes, gravity load over point B.

MR. JOYCE: Over point B the gravity load would cause deformation of this link end and this link end so that they would come in contact to absorb the load. And the same thing would follow with this link end and that adjacent portion, and this one and this one, and this one and this one, this one and this one, this one and this one, this one and this one, this one and this one.

THE COURT: All right. How many points of junction of adjacent modules do you see along point B? Let me put it that way.

MR. JOYCE: How many points of juncture?

THE COURT: Right.

MR. JOYCE: Well, this link ends joins one, two. This —

THE COURT: When they're immediately adjacent to each other. Do you follow me? Do you see where line 2 passes through?

MR. JOYCE: Yes. They're immediately adjacent right here, sir, these two.

THE COURT: Well, it wouldn't be just there. It would also —

MR. JOYCE: No, and this one and this one, this

one and this one, this one and this one, and that's it.

THE COURT: Now, wouldn't you agree that the load is distributed in the middle one that's colored bright red? Wouldn't you agree that any load you put on B is distributed across all the link ends of that module?

MR. JOYCE: Is distributed across all the link ends of that module?

THE COURT: Right. Or at least up to the top one and not just directly on point B, right? If you put the load on it, it would distribute the load, wouldn't it?

MR. JOYCE: The link ends would compress in this fashion.

THE COURT: That's right. And it would distribute the load all across it, is that right?

MR. JOYCE: That's correct.

THE COURT: Now, when the load is transmitted to the adjacent modules that lie above line 2, we'll just take a look above line 2, it would be transmitted, wouldn't it?

MR. JOYCE: They would be absorbed by both — the interaction of both of them.

THE COURT: All right. Now, isn't it true that the load-bearing capability would be less in that configuration than if, in fact, they were staggered by brick laying?

MR. JOYCE: They are staggered by brick laying,

sir.

THE COURT: No. If they were staggered by brick laying so that when line 2 goes through, where line 2 goes through, you do not have any modules where there is not a link end that does not — it's hard for me not being an engineer to translate this. It just seems to me to make common sense where you have the intermediate disposition as called for in claim 19 where there is a link end — where the link ends are staggered with regard to each module that the load bearing across the pivot rods because of the buttress effect would be more efficient in the staggered relationship than in that relationship that's shown there. I'm afraid I can't translate that into engineer talk.

MR. JOYCE: I think maybe what you're trying to say is that the testimony of the witness was that there was a distinction because this is not a module which is a like module to this. Is that what you're trying to say?

THE COURT: No. What I'm trying to say is that where you have — transmitting the load — put up the thing that shows the brick laid pattern. Have you got an illustration of that?

MR. JOYCE: The brick laying pattern.

THE COURT: Right. Of your device let's say. Or of the plaintiff's. Is there —

MR. HAYES: We have a chart, Your Honor. Do you

want that chart?

THE COURT: Yes. Just give me something to show that. Now, put that up side-by-side with that other one. Does that show the brick layered pattern now?

MR. JOYCE: It's a fragmentary view but you can see how it's brick laid.

THE COURT: Now, at any point across there because of the intermediate disposition of the adjacent modules in that staggered fashion, let's say you put a load on right at the point where the blue module and the pink module come together in the front — see in front of the green one. Let's say you put a load right at that point.

MR. JOYCE: Where are we talking right here?

THE COURT: No. Move your pointer down, down and then up a little bit. There you go. Right there. Right at the junction of those three. All right? Wouldn't you agree that because of the intermediate disposition of all the modules with regard to each other, the load is spread evenly across those modules, is that right?

MR. JOYCE: Across blue, green, and pink?

THE COURT: Yes. Is that right?

MR. JOYCE: The load to be applied here, all of these intermission modules will tend to collapse on one another and absorb the —

THE COURT: All right. Now, if you put the load

[90]

on the way that figure 9 there of the Malard patent has got it, let's say you put it at right where you've got your pointer not at B, but right there, what means is there for spreading that load amongst all of the modules that are adjacent to that point?

MR. JOYCE: All the continguous modules?

THE COURT: Yes.

MR. JOYCE: As you apply this load, Your Honor —

THE COURT: There's no intermission. All there is is adjacent physical contact.

MR. JOYCE: I understand that, but they're adjacent in physical contact and as they tend to bend, these link ends will compress against one another.

THE COURT: Doesn't that depend on how they're manufactured rather than the concept? That depends on manufacture and technique, not concept. The brick laying is a concept that's independent of manufacture and technique, isn't it?

MR. JOYCE: This is admittedly brick laying. The witness said it's brick laying. There's no question about it.

THE COURT: He said that based on your assumption, on your hypothetical.

MR. JOYCE: But I asked him what is disclosed in this. I asked him is this brick laying. He said, yes.

. . . . . .

out all the blue ones and throw them away?

A. It would probably operate but it wouldn't be very functional.

Q. It would probably operate if you took them out? Took all the blue ones out, it's your testimony, it would probably operate?

A. Depending on the kind of loads you put on it and so forth, but it's certainly not intended to operate that way.

Q. Excuse me, sir. I have one more question on this. Is this module here, sir, brick laid with respect to this module? You probably better look it up, PX 134. Is module 1 brick laid with respect to module 2?

A. If my understanding of brick laying is correct, and I think I testified in my deposition I had some question about your terminology of brick laying, it is intended that once they intermesh, they won't move one with respect to the other. They overlap as in brick laying, and yes, they do overlap. As far as those two are concerned, but not necessarily as far as the whole belt is concerned.

Q. It's your testimony 1 and 2 are brick laid?

A. Just as far as those two are concerned. They're not brick laid into the rest of the belt.

Q. If I take two bricks, sir, and I put one on top of the other, is that brick laying under your —

A. Just putting it on top of each other it's not.

Q. Why?

A. I believe when we think of brick laying, we think of a certain amount of overlap.

Q. Now, let's look at this, sir. This 1 and 2 are put one on top of each other, right? They're not staggered with respect to each other, are they?

A. No, but they are intermeshed.

Q. Are they staggered with respect to one another, sir, 1 and 2?

A. No, but they are intermeshed so they won't move with respect to each other.

Q. Just answer the question. Is 1 and 2 staggered with respect to one another?

A. No, they are not.

Q. And, sir, let's look a little bit above 1 and 2. There's a seam in there, correct?

A. Yes.

Q. Let's look a little bit below 1 and 2 and there is a seam in there, correct?

A. That's right.

Q. Now, let's look above this (indiscernible) here with A, and there's a seam in there, correct?

A. Yes.

Q. Do you know what a classically brick laid belt is

. . . . . .

patent, the Lapeyre patent. Excuse me, I'm sorry. Fig. 4. And Lapeyre teaches you how to make a belt of variable widths? Right?

A. Yes, presumably.

Q. And it teaches you how to stagger the modules with respect to other modules?

A. Yes.

Q. And you've seen the white Lapeyre belt that's here that's the subject matter of the 141 patent? The big white one?

A. I believe I have.

Q. And isn't it true, sir, that in that belt you don't have seams?

A. I'm not sure. Seams where?

Q. Seams running across the modules? Widthwise? Longitudinal seams?

A. You have a seam where the rod goes through them.

Q. Seams in this direction.

THE COURT: Along the direction of travel.

BY MR. HAYES:

Q. Along the direction of travel?

A. Right. That't my understanding that there is not a continuous line where the modules end, if that's what you mean.

Q. Right. And, sir, I think as you testified, module

1 and module 2 on top there is a seam, correct?

A. Yes.

Q. And below there's a seam?

A. That's right.

Q. And over here there's a seam on that end.

A. But it does not pass continuously through the belt because there are other elements in there that interlock.

Q. And over here is a seam, is that correct, sir?

A. Yes.

Q. Surely you don't contend that that's brick laying in accordance with the teachings of Lapeyre?

A. From what I see here and what I understand of brick laying, that shows brick laying because even though there is a seam on each side of that, nevertheless there are elements in the center that break up the continuity of that seam. And that is my understanding of brick laying.

Q. Does that show a belt? I'm not talking about partial belts or belts with things taken out of it. I'm talking a belt.

A. Yes, that —

Q. A whole belt?

A. No. That shows a piece of a belt.

Q. Does fig. 9 there of that piece of the belt show brick laying as taught by Lapeyre where there are no seams running along the line of travel?

. . . . . .

considered to be the most pertinent, and I wrote a letter to Mr. Lapeyre indicating that we had received an action from the German patent office. And very interestingly, the German patent office had no seen fit to cite any of the references that had been considered by the German patent office on the Heim Lehmann petition, and particularly Malard was never considered by the — was considered by the patent office, but obviously was not considered to be pertinent. We didn't feel we'd have any difficulty with the references that were cited by the German patent office, and subsequently, I believe, the German patent office has allowed the claims notwithstanding their knowledge of Lehmann — I mean, their knowledge of Malard. So we felt very comfortable with respect to Malard, that Malard was simply not pertinent because the Swedes had not considered it pertinent; the Germans had not considered it pertinent; and we didn't consider it pertinent.

BY MR. HAYES:

Q. Now, what was the basis, if you can recall, for your determination that Malard was not pertinent?

A. I think basically Malard was no more pertinent than most of the references we looked at and discarded because they simply didn't fit within the limitations of the claims. For example, I don't think Malard showed brick laying as the claims required. Malard didn't show a belt made of a plurality of like modules as the claims require. Malard

had, I think, six different types of, if you want to call them modules, rather than a plurality of like modules. There were other more subtle differences but I thought those differences were adequate to dismiss Malard as simply not pertinent.

Q. Now, at any time during the prosecution of the 141 patent, did you intend to conceal a material reference from the United States Patent and Trademark Office?

A. I don't want to be flip by saying, you have to be kidding, but I've been in practice for 30 years. I've never concealed anything from anybody. I certainly wouldn't do it in this instance.

Q. And you understood your duty of disclosure? do you teach that?

A. I teach it. I practice it assiduously, religiously.

MR. HAYES: No further questions.

THE COURT: Mr. Joyce?

CROSS EXAMINATION

BY MR. JOYCE:

Q. Let me see if I have this straight, Mr. Schiller. The Malard patent was first cited in a Swedish counterpart to the 141 application, is that correct?

A. To the best of my memory, yes.

Q. Now, indeed, it wasn't the counterpart to 141. Wasn't it, indeed, a counterpart to the parent of the 141 case?

. . . . . .

THE COURT: Go ahead, Mr. Joyce.

BY MR. JOYCE:

Q. Go ahead.

A. We subsequently amended claim 26.

THE COURT: I don't need to hear anymore. Go ahead.

BY MR. JOYCE:

Q. Now, claim 26 I believe you just stated is end to end reversible, correct?

A. I'd have to look again. Yes. It's end to end reversible.

Q. It's end to end reversible. Now, the Malard patent, which is Defendant's Exhibit 28, illustrates a module in figure 1. Is that an end to end reversible module?

THE COURT: Wait a minute. There's no indication he had that prior to 1971.

MR. JOYCE: No, sir. I think if you just bear with me, Your Honor, you'll get the point.

THE COURT: All right.

BY MR. JOYCE:

A. Malard shows six different modules, sir. Which one are you talking about?

Q. Anyone you want. Is there any end to end reversibility?

A. I haven't had a opportunity to study this, and if you'll bear with me for perhaps 15 minutes while I look it over?

THE COURT: He's not a technical witness, Mr.

. . . . . .

your answer.

THE COURT: Go ahead.

BY MR. JOYCE:

A. The basic reason that I was not concerned about Malard is not the question of end to end reversibility which is not the pertinent point. I pointed out, I think earlier, that I didn't believe Malard was pertinent because it didn't show the major features of the claim, not the question of end to end reversibility. There were other features, important features such as brick laying, that weren't shown by Malard.

Q. You don't consider that —

A. No. I don't consider that brick laying. You lay bricks with bricks. You don't lay bricks with four or five different types of bricks. At least not as I understood brick laying at the time.

Q. I refer you to the letter of September 23, 1975 that's in the German file as directed to your client.

A. What's the date, Mr. Joyce?

Q. September 23, 1975. I think I have a paperclip on the right side.

A. Yes, I have it.

Q. Do you see a reference to the Malard patent there?

A. Yes.

Q. What were you communicating with that letter?

. . . . . .

Mr. Bailey testified disclosed a module which is not end to end reversible, the claims abroad can be distinguished from Malard in that respect. We're claiming end to end reversibility. It's not in Malard, therefore, Malard is not relevant. However, in claim 19 there isn't any end to end reversibility feature. That was added after, just a matter of a few months after —

THE COURT: There's a claim of a plurality of like modules and Malard doesn't call for like modules, does it?

MR. JOYCE: I think Malard calls for like modules.

THE COURT: Where in the text of Malard does it say that you're supposed to make them alike? Every illustration shows different ones. Figure 9 shows a whole bunch of different ones.

MR. JOYCE: Figure 9 shows how many different ones? We have one and this is a second one, and this one on the other end is nothing more than the same module turned upside down, isn't it?

THE COURT: It's different.

MR. JOYCE: So it's different. But Your Honor —

THE COURT: Actually there are four.

MR. HAYES: There's six.

THE COURT: Maybe there's six.

MR. HAYES: You can't turn them upside down,

. . . . . .

say even if, assuming that end to end reversibility thing wasn't before the foreign examiners, you could in good faith say that Malard is not highly relevant.

MR. JOYCE: Well, Your Honor, Malard —

THE COURT: Well, sure you can conjure up a situation where they're all alike.

MR. JOYCE: No, it's not conjuring up. This module is completely within the contemplation and the statement of Malard. And Malard says you don't have to make them three and two. He says that you can make them longer with different numbers of projection B. That's what we've done. We've made them four and three. And when you make them four and three and then you make your sub-module with plurality of link ends on one side and plurality of link ends on another, such as shown in this white portion, you have a like module in accordance with the terms that are applied by plaintiff and applying that claim to our accused product wherein we have a full module and a partial module. Absolutely. And then when that occurs and you take the one simple step, just do that, do nothing more, you do one more step. You remove the heading here and put that at the bottom, you have claim 19 to a T. And that is, Your Honor, what we consider to be material prior art.

THE COURT: In hindsight it is, but by what judgment am I to — by what standard am I to judge what Mr. Schiller